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CITATIONS

Cases:

679233—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, APPELLANTS

v.

THE STATE OF NORTH CAROLINA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court, 210 F. Supp. 675, and its final judgment are set forth in Appendix A, *infra*, pp. 18–47. The report and order of the Interstate Commerce Commission (Division Three) are not yet reported, but appear in Appendix B, *infra*, pp. 49–59. The report and recommended order of the Commission's Hearing Examiner are reprinted in Appendix C, *infra*, pp. 60–86.

JURISDICTION

This suit was brought under 28 U.S.C. 1336, 1398, 2284 and 2321–2325 to set aside and enjoin an order

of the Interstate Commerce Commission. The opinion and final order of the three-judge district court were entered on October 19, 1962. The Interstate Commerce Commission and the United States filed notices of appeal in the district court on December 17, 1962. An extension of time to March 19, 1963, for the filing of the record and the docketing of the appeal was entered by the lower court on February 8, 1963. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *New Jersey* v. *United States*, 359 U.S. 27; *Transit Commission* v. *United States*, 284 U.S. 360; and *Colorado* v. *United States*, 271 U.S. 153.

STATUTES INVOLVED

Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2) reads as follows:

> Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect

such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. * * *

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, under Section 13a(2) of the Interstate Commerce Act, the Interstate Commerce Commission must refuse permission to discontinue intrastate passenger trains when there is a substantial deficit from the passenger service and there is little public demand for it, solely because the total operation on the particular line involved is sufficiently profitable to make a fair proportionate contribution to overall company operations.

2. Assuming an affirmative answer to the first question, whether, in the circumstances of this case, the court was warranted in making a determination on its own initiative that the particular line as a whole did make a fair contribution to overall company operations, instead of remanding to the Commission for that determination.

3. Whether the district court invaded the Commission's discretion by re-evaluating the evidence and ruling that it did not support the conclusion that the discontinuance was consistent with public convenience and necessity.

STATEMENT

On July 8, 1959, the Southern Railway Company filed a petition with the North Carolina Utilities Commission to obtain permission to discontinue intrastate passenger trains Nos. 13 and 16 running between Greensboro and Goldsboro, North Carolina. The same equipment is used for both runs, the train bearing No. 16 when it is east-bound and No. 13 on the return trip. It is the only remaining passenger rail service between the two towns. The line involved is about 130 miles long. The State Commission denied permission to discontinue the trains, and the ruling was sustained upon appeal to the North Carolina Supreme Court. *North Carolina* v. *Southern Railway Co.*, 254 N.C. 73, 118 S.E. 2d 21.

Pursuant to the provisions of Section 13a(2) of the Interstate Commerce Act, Southern subsequently filed a petition with the Interstate Commerce Commission requesting permission to discontinue the same trains. A hearing was held before an examiner at which several protestants, including the State of North Carolina, appeared in opposition to the petition. On October 27, 1961, the examiner served his detailed report (App. C, *infra*, pp. 60–86). He found that the operation of the trains resulted in a net loss to Southern; that the public demand for the service was slight and had sharply declined since 1948; and that adequate

alternative means of transportation existed to serve the public. On this basis he ruled that the discontinuance of passenger trains Nos. 13 and 16 was consistent with the present and future public convenience and necessity and that their continued operation would constitute an unjust burden on the interstate operations of the carrier and an undue burden on interstate commerce. Accordingly, he recommended that the petition to discontinue the train service be granted.

Division Three of the Commission by its report dated June 27, 1962 (App. B, *infra*, pp. 49–59) adopted the findings and conclusions of the examiner and issued an order authorizing discontinuance. By way of clarification it also set out its own views on certain of the issues involved. A petition for reconsideration was denied.

The State of North Carolina and other protestants instituted an action in a three-judge district court seeking to set aside and enjoin the order of the Commission. On October 19, 1962, the court issued its opinion and decree (App. A, *infra*, pp. 18–47). The order (1) set aside the Commission's order; (2) required the Southern to reinstate, within five days, the service which had been discontinued pursuant to the Commission's order; and (3) "permanently and perpetually enjoined and restrained [Southern] from discontinuing passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, North Carolina" (App. A, *infra*, p. 46).

The court held that the Commission had erred in finding a burden on interstate commerce solely on

the basis of the deficits resulting from the operation of passenger trains Nos. 13 and 16. In the court's view, the freight operations of the company on the same segment of line should have been taken into account. Noting the profit realized on freight, which more than offset the loss from passenger services, the court thought the total line services between Greensboro and Goldsboro probably made a proportionate contribution to the company's operations (App. A., *infra*, p. 42). After re-appraising the public convenience and necessity related to the trains in suit, the court concluded that retention of the passenger service would not work an "*unjust*" or "*undue*" burden on interstate commerce (App. A, *infra*, pp. 44–45).

Although it found that the "evidence in the record is not clear or full on the question of whether this segment of the line is contributing its fair share to the over-all company operations" (App. A, *infra*, p. 42), the court declined to remand to the Commission for a determination of the question (App. A, *infra*, p. 45.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents important questions involving the proper criteria to be applied in a discontinuance proceeding under Section 13a(2) of the Transportation Act of 1958 and is the first litigation of its kind to reach this Court.[1] Primarily at stake is whether

[1] *New Jersey* v. *New York, Susquehanna and Western R. Co.*, No. 104, decided February 18, 1963, ruled on the question of what constitutes an intrastate train under Section 13a(2).

in enacting Section 13a(2) Congress intended that interstate railroads must continue unprofitable intrastate passenger services for which there is little public demand whenever the freight service on the same line is sufficiently profitable to offset the loss and contribute a proportionate share to overall company operations. Resolution of this issue involves the proper interpretation of a statute concededly intended to help rehabilitate the seriously depressed railroad industry.

We submit that plenary consideration is also warranted because the court below, in reviewing the Commission's determinations under this recent statute, performed functions which only the Commission should perform. The court affirmatively found that the operation of the passenger service constituted no burden on interstate commerce and, in effect, that continuance was required by the public convenience and necessity; for, instead of remanding to the Commission, the court enjoined discontinuance of the service.

1. In a major effort to resolve the serious, and sometimes critical, financial difficulties confronting many of the nation's railroads, Congress passed the Transportation Act of 1958. 72 Stat. 568 *et seq.* A primary cause of that crisis was the excessive drain on railroad finances resulting from unprofitable passenger services and the serious obstacles encountered by the railroads in attempting to rid themselves of deficit operations. Section 13a of the Act was designed to alleviate this problem by facilitating the discontinu-

ance of burdensome services for which there is no great public demand. See *New Jersey* v. *New York, Susquehanna and Western R. Co.*, note 1, *supra*.

Prior to 1958, the power to authorize the discontinuance of any particular train service, whether interstate or intrastate, was exercised solely by the States. Consequently, for a railroad to discontinue any train that crossed state boundaries, permission of all States concerned was necessary. The Interstate Commerce Commission was not empowered to authorize discontinuance of particular trains; under Section 1(18)–(20) of the Interstate Commerce Act, 49 U.S.C. 1(18–20), it could only authorize total abandonment of the line, which meant the cessation of all services on that line. *Board of Public Utility Commissioners of New Jersey* v. *United States*, 158 F. Supp. 98 (D.N.J.), dismissed as moot, 359 U.S. 982.

It was with a view to facilitating the elimination of unprofitable services that Congress altered this scheme of regulation by the 1958 Act. Section 13a(1) permits rail carriers, without prior permission, to discontinue trains that operate across state lines, subject to an order directing resumption of that service if the Commission finds that the public convenience and necessity require it and that interstate commerce will not be unduly burdened. *New Jersey* v. *United States*, 168 F. Supp. 324, affirmed, 359 U.S. 27. Section 13a(2) of the Act empowers the Commission to order the discontinuance of a train operating "wholly within the boundaries of a single State" if the State has first denied permission or failed to act upon an

application within 120 days and if the Commission, after a full hearing, finds (1) that discontinuance is consistent with "the present or future public convenience and necessity" and (2) that continued operation "will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce."

The passenger service which the Southern Railroad seeks to discontinue is clearly a losing operation. The Commission found that the discontinuance of the two trains would result in net annual savings to the railroad in excess of $90,000 (App. C, *infra*, p. 78). In authorizing the discontinuance, the Commission ruled that these losses were not justified by the meagre public demand for the passenger service [2] and that the existing demand could be adequately satisfied by alternative means of transportation.[3] The court below reversed the Commission on the ground that no burden on interstate commerce could be established under Section 13a(2) because the railroad realized a substantial profit of $630,000 (App. A, *infra*, p. 41) from its freight operations on the Greensboro-Goldsboro line. This, in the court's view, showed that the line, as a whole, made a proportionate contribution to company operations. The court also noted that the railroad's overall financial condition was sound.[4]

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[2] The average number of passengers carried each day by each of the two trains was 19.5, 20.2 and 29.6 for 1959, 1960, and the first five months of 1961, respectively (App. C, *infra*, p. 67).

[3] See note 14, *infra*.

[4] In 1960 the Southern Railway Co. netted after taxes $30,702,542 (App. A, *infra*, p. 42).

The standard applied by the court finds no support in the express language of Section 13a(2). Nor is it consistent with the intent of Congress as reflected in the legislative history. In enacting this section, Congress focused on the deficits produced by the specific service to be discontinued, not on the net of passenger and freight operations on a given line or upon the general operation of the railroad, at least in the absence of heavy demand for the service in question.[5] The report of the Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1647, 85th Cong., 2d Sess., p. 21, makes the point clear:[6]

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[5] Contrary to the court's indication (App. A, *infra*, p. 25), the examiner, whose report was adopted by the Commission, did consider the overall financial condition of the carrier but concluded that in the circumstances, "petitioner's system operations are entitled to little or no weight" (App. C., *infra*, p. 77). It is true that this factor may be important when there is a heavy public demand for the deficit service, as is the case with many commuter services. However, as the Senate and House committee reports show (*infra*), Congress did not intend that only unstable railroads should be allowed to discontinue unprofitable services. To effectuate its purpose of ensuring a sound railroad industry, Congress intended to allow stable railroads to discontinue deficit services for which there is little demand so as to remain healthy.

[6] Both S. 3778, 85th Cong., 2d Sess., p. 6 and H. 12832, 85th Cong., 2d Sess., p. 9, as reported out of their committees required, as a condition to an order effecting reinstatement of a discontinued service, that "such operation or service will not result in a net loss therefrom to the carrier", in addition to the requirements of burden on interstate commerce and public convenience and necessity. This would have forbidden the Commission to order resumption of an unprofitable service.

> A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce.

Although the bill which came out of the House Committee on Foreign and Interstate Commerce granted the Commission authority to permit discontinuances only of interstate trains, that Committee's report likewise reflects Congressional concern only for the particular deficit service, H. Rep. 1922, 85th Cong., 2d Sess., pp. 11–12:[7]

> A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations.
>
> * * * * *

However, since the bills were worded so that a discontinuance could be effected without prior permission from the Commission and an order of continuance would be prevented by showing only a "net loss," regardless of public convenience and necessity, this requirement was dropped. H. Rep. No. 2274, 85th Cong., 2d Sess., pp. 6, 41.

[7] The bill which was accompanied by this report did not authorize the Commission to act with respect to intrastate train discontinuances. H. 12832, 85th Cong., 2d Sess., p. 10.

> Where this passenger service * * * cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for.

If the rule engrafted by the lower court on Section 13a(2) were to endure, the Congressional purpose to free the railroads from deficit passenger services which siphon off the profits from other operations would be frustrated. Since in many cases the losses on an intrastate passenger operation are sufficiently offset by freight profits on the same line, the consequence of the lower court's rule would be the continued subsidizing of unprofitable passenger services for which there is little public need—the very situation that Congress proposed to alter.

The district court sought to justify its holding on the basis of the decisions in *Chicago M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, and *Public Service Commission* v. *United States*, 356 U.S. 421, both of which antedated the Transportation Act of 1958. These cases arose under Section 13(4) of the Interstate Commerce Act, which authorizes the Commission to order an increase in intrastate rates which unjustly discriminate against interstate commerce,[8] and held that the Commission had erred in finding discrimination against interstate commerce without considering the overall, state-wide profitableness of the intrastate operations. The court below reasoned that Section 13a(2) cases "stand in an *a fortiori* relationship to

[8] The 1958 Transportation Act amended this section by adding the criterion "undue burden on" interstate commerce. See note 9, *infra*.

Section 13(4) cases" (App. A, *infra*, p. 27) since a Commission order of discontinuance is a more drastic infringement of the rights of States than merely ordering the raising of intrastate rates.

But the law has been changed since those cases were decided. As a direct response to these decisions, the Transportation Act of 1958 included an amendment to Section 13(4) which specifically eliminated the requirements imposed by the *Chicago* and *Public Service Commission* cases,* and thereby ratified the Commission's settled practice of determining the lawfulness of intrastate rates without allocating property, revenues, and expenses between interstate and intrastate operations. See *Utah Citizens Rate Assn.* v. *United States*, 192 F. Supp. 12, 19, n. 3, affirmed *per curiam*, 365 U.S. 649. The obvious effect of this

*The italicized words were added to Section 13(4) in 1958:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, *or undue burden on*, interstate or foreign commerce (*which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State*), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden."

amendment is to undermine the premise of the lower court's reasoning."

2. The court below also overstepped the limitations of judicial review and entered an area committed to the Commission's discretion.

a. Even assuming *arguendo* the correctness of its statutory interpretation, the court misconstrued its reviewing role in making the affirmative finding that the operation of trains 13 and 16 constituted no burden on interstate commerce. On its view of Section 13a (2), the court should have remanded the case to the Commission for further proceedings—especially since the court concluded that the "evidence in the record is not clear or full on the question of whether this segment of the line is contributing its fair share to the over-all company operations" (App. A, *infra*, p. 42).

Moreover, the court erred in applying its own rule. In determining that the Greensboro-Goldsboro line did contribute its fair share to total company operations, the court compared the average system-wide passenger loss per mile, and the average system-wide revenue per passenger mile with comparative averages on the Greensboro-Goldsboro line (App. A, *infra*, pp. 42–43). However, the court was unable to make any comparable calculations with respect to freight opera-

[10] The lower court in the instant case argued that since Congress had inserted the parenthetical words in Section 13(4) but not in 13a(2), it intended that the rule of the *Public Service Commission* and *Chicago* cases should apply in establishing a burden on interstate commerce in intrastate discontinuance proceedings. However, the legislative history supports no such inference. Indeed, as we have seen, Congress emphasized the burden on interstate commerce of the particular deficit passenger service itself.

tions, as the court's approach would seem to demand, since there were not "comparative figures relating to freight profits in the record" (App. A, *infra*, p. 43). Because of this deficiency, the court was forced to base its ruling on the surmise that the "evidence points in the direction that the Greensboro-Goldsboro line contributes at least its fair share" (App. A, *infra*, p. 42).

In the absence of comparable figures showing the proportionate contribution made by the Greensboro-Goldsboro freight operations to the total company freight operations, the court apparently accepted as sufficient indication of a proportinate contribution a profit figure of $630,000 from the Greensboro-Goldsboro line. That figure was based on the average system-wide freight profits per mile, multiplied by the number of miles between Greensboro and Goldsboro. Not only is this formla unreliable because it fails to consider comparability of conditions that affect costs;[11] it also fails to make a breakdown between interstate and intrastate freight revenues. In any event, such determinations are clearly not within the court's province; they are solely for the Commission. *Colorado* v. *United States*, 271 U.S. 153.

b. The court also held that the Commission's finding that the discontinuance was consistent with the present or future public convenience or necessity was not supported by substantial evidence of record (App.

[11] The $630,000 figure does represent an adjustment of 61 percent for lesser density of freight traffic on the Greensboro line (App. A, infra, p. 43).

A, infra, pp. 44–45).[12] The court's duty in reviewing the substantiality of the evidence was merely to determine whether there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–87. We believe that this standard was more than satisfied. Although we do not discuss the evidence in detail here, we point out that the Commission considered the relatively slight demand for the train services and the decline of patronage since 1948;[13] the available alternative modes of transportation and their adequacy;[14] the impact of passenger discontinuance upon industrial development in the area;[15] and the meagre public opposition that was manifested at the hearings.

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[12] The lower court did not set aside any of the subsidiary findings of fact made by the Commission; on the contrary, the court declared: "[t]he basic facts are not in conflict—nor is there any real conflict in the evidence offered by the parties" (App. A, *infra*, p. 44). Nor did the court find any deficiencies in the record (App. A, *infra*, p. 45).

[13] In 1948 both trains carried over 56,000 passengers. In 1959, 1960 and the first five months of 1961 the trains carried 14,251, 14,776, and 8,934 respectively. The average number of passengers per train each day was 19.5, 20.2 and 29.6 for 1959, 1960 and the first five months of 1961, respectively (App. C, *infra*, pp. 67–68).

[14] Passenger service by bus and rail is available for most of the major communities. Air passenger service is also available for some communities (App. C, *infra*, pp. 79–80). In addition there is a network of all-weather, paved highways (App. C, *infra*, pp. 70–71).

[15] App. C, *infra*, p. 80.

CONCLUSION

This appeal presents questions of substantial importance in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1963.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION

C–158–D–62

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INCORPORATED; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; AND MARY TRENT SEMANS, PLAINTIFFS

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND SOUTHERN RAILWAY COMPANY, DEFENDANTS

Thomas Wade Bruton and Charles W. Barbee for State of North Carolina; E. C. Bryson for Duke University; F. Gordon Battle and Victor S. Bryant for Durham Chamber of Commerce and Research Triangle; A. H. Graham, Jr. for Erwin Mills; and E. C. Brooks, Jr. for Mary Trent Semans

H. Neil Garson and William H. Murdock, District Attorney, for United States of America; H. Neil Garson for Interstate Commerce Commission; and Joyner and Howison, Major L. P. McLendon, James A. Bistline, and Earl E. Eisenhart, Jr. for Southern Railway Company

Before BELL, Circuit Judge, and CRAVEN and PREYER, District Judges.

OPINION

L. RICHARDSON PREYER, District Judge

This is an action brought under USC Title 28, Section 1336, in accordance with USC Title 28, Sections

1938, 2284 and 2321–2325. Its purpose is to set aside and enjoin enforcement of an order of the ICC granting Southern Railway Co. the right to discontinue all remaining passenger service between Greensboro, N.C., and Goldsboro, N.C. Acting under U.S.C. Title 49 Section 13a(2),[1] the Commission found that (1) the present or future public convenience and necessity permit such discontinuance, and (2) continuance of the operation would constitute an unjust and undue burden on interstate operations of the carrier and upon interstate commerce.

On July 18, 1959, Southern Railway Company filed a petition with the North Carolina Utilities Commission for discontinuance of its trains Nos. 13 and 16 which are the last passenger trains operating between Goldsboro and Greensboro, North Carolina. Actually,

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[1] Section 13a(2) provides that:

"Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any state or where the state authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records, and facilities of the authorities in such State in the performance of its functions under this paragraph."

only one train is involved, it being designated No. 16 in one direction and No. 13 on the return trip.

Train No. 16 leaves Greensboro daily at 6:10 a.m., makes twelve regular stops and arrives in Goldsboro at 10:45 a.m. Its principal stops are Burlington, Durham, Raleigh, and Selma.

Train No. 13 leaves Goldsboro daily at 4:05 p.m. and arrives in Greensboro at 8:50 p.m. with similar stops along the route.

A sleeping car is attached to the train and by connection with other trains at Greensboro there is service to and from Washington, New York, and other major centers along the Eastern Seaboard.

These trains carry express but no freight or mail. The coaches have a capacity of 80 passengers. In addition, there is a 6 bedroom, ten-roomette sleeping car. There are six employees paid by the railroad servicing the train.

After hearings, the State Commission denied the application. Southern appealed to the North Carolina Superior Court, which affirmed the decision, and then to the Supreme Court of North Carolina which also affirmed. *Utilities Comm.* v. *R.R.*, 254 NC 73, 118 S.E. 2d. 21 (1961).

On April 16, 1962, Southern filed a petition with the Interstate Commerce Commission under Section 13a(2) of the Interstate Commerce Act, again seeking authority to discontinue the trains. The State of North Carolina and the other protestants were allowed to intervene.

The entire records of the hearings before the North Carolina State Utilities Commission, the North Carolina Superior Court, and the North Carolina Supreme Court were made a part of the record for consideration by the Interstate Commerce Commission.

The proceedings were referred to an ICC Examiner who, after holding hearings, recommended that the discontinuance be allowed. On July 2, 1962, Division 3 of the ICC issued an Order adopting the findings and conclusions of the Examiner and authorizing the discontinuance of the trains. A petition for reconsideration was denied by the ICC. This action followed.

ISSUES DISMISSED

At the threshold of the case, plaintiffs raise certain legal questions which, if meritorious, would require dismissal of the ICC Order without reaching the substantive aspects of the case. Specifically, plaintiffs attack the constitutionality of section 13a(2); they claim a defect in the giving of notice of the discontinuance, as required by law; they contend that a lease from the North Carolina Railroad Corporation to the Southern Railway Company requires the continuance of these operations; and they claim that the decision of the North Carolina Supreme Court is res judicata on the issues, and that the ICC cannot make a contrary determination without a showing of changes in the surrounding circumstances that occurred after the North Carolina Supreme Court decision. We think all of these arguments are without merit.

Plaintiffs' attack on the constitutionality of section 13a(2) is without merit. The scope of the commerce power is such that there is little room for doubt of the constitutionality of an act allowing the ICC to eliminate intrastate operations that adversely affect interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat (22 U.S.) 1, 16 L. Ed. 23 (1824); *Wickard* v. *Filburn*, 317 U.S. 111 (118), 63 S. Ct. 82, 87 L. Ed. 122 (1942); *Wisc. R.R. Com.* v. *Chicago, Burlington and Quincy R.R. Co.*, 257 U.S. 563, (589–590), 42 S. Ct. 232, 66 L. Ed. 371 (1922); *Colorado* v. *U.S.*, 271 U.S. 153 (163,

165–166), 46 S. Ct. 452, 70 L. Ed. 878 (1926). We find section 13a(2) constitutional.

As to plaintiffs' claim of a defect in notice, it is clear that the claim is based on an oversight by the ICC in failing to change a reference in 49 CFR 43.6 when 49 CFR 43.5 was amended and renumbered. Section 13a(2) merely requires that the ICC notify the Governor of the state in which the train is operating. No further notice is required under section 13a(2) or under the commission regulations. We find that all requirements pertaining to notice have been met.

Plaintiffs further allege that the discontinuance of the trains in question would constitute a breach of the Lease Agreement between the Southern Railway Company and the North Carolina Railroad Company, dated August 16, 1895, and, consequently, that it is unlawful for the ICC to authorize such discontinuance. But no obligation to require the Southern to operate passenger trains over the lines leased from the North Carolina Railroad can be unambiguously spelled out of the lease. Furthermore, this issue was not raised before the ICC, and it should not be raised here for the first time. *Carolina Scenic Coach Lines* v. *United States et al*, 56 Fed. Supp. 801 (803–804) (W.D. N.C. 1944); *Unemployment Comp. Com.* v. *Aragon*, 329 U.S. 143 (155), 67 S. Ct. 245, 91 L. Ed. 136 (1946); Davis, *Administrative Law Treatise*, Section 20.06. Besides, the paramount power of Congress to regulate interstate commerce forces even express charter or lease provisions to give way before it. This has been held many times and is no longer in question. *Colorado* v. *United States*, 271 U.S. 153 (165–166), 46 S. Ct. 452, 70 L. Ed. 878 (1926); *Texas* v. *United States*, 292 U.S. 522, 531, 54 S. Ct. 819, 78 L. Ed. 1402 (1934); *Moeller* v. *Interstate Commerce*

Commission, 201 F. Supp. 583 (S.D. Iowa, 1962); *Burke County, Georgia* v. *United States*, C.A. 1031 (S.D. Georgia, July 2, 1962, opinion not published).

Plaintiffs also seek to invoke the doctrine of res judicata to bar the ICC from considering the question of public convenience and necessity, alleging that this issue has been determined by the North Carolina Supreme Court in *State of North Carolina* v. *Southern Railway Company*, 254 N.C. 73, 118 S.E. 2d 21 (1961). This position cannot be sustained. Res judicata is a common law device to prevent litigation of matters already litigated between the same parties or those in privity with them. *United States* v. *California Bridge & C. Co.*, 245 U.S. 337 (341), 38 S. Ct. 91, 62 L. Ed. 332 (1917). It is clear that a statute may change this common law rule. The statute before us, section 13a(2), provides "* * * [W]here the State authority having jurisdiction thereof shall have denied an application * * * for authority to discontinue * * *, [the] carrier * * * may petition the [Interstate Commerce] Commission for authority * * * the Commission may grant such authority only after a full hearing and upon findings by it * * *." Since the statute requires the ICC to hold full hearings and to make findings, after a state decision, it seems quite clear that Congress did not intend for the state hearing to have res judicata effect. Cf. *Sprague* v. *Wall*, 7 Cir., 122 F. 2d 128 (1941); *NLRB* v. *Pacific*, 8 Cir., 228 F. 2d 170, 176 (1956). This interpretation is reinforced by the legislative history of section 13a(2) which shows that Congress was motivated by a belief that State authorities were unduly regressive in that they often required continuance of uneconomic and unnecessary service. (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), pp. 21–22, H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), pp. 11–12). The conclusion

follows that Congress did not intend the ICC to give State determinations res judicata or collateral estoppel effect.

We proceed to the substantive issue in the case.

ISSUES INVOLVED

The central issue in the case is whether the order of the ICC authorizing discontinuance of the two trains is warranted in law and is supported by adequate findings based on substantial evidence of record.

Judicial review of an order of the ICC is limited. We may not set aside the ultimate findings of the Commission unless they are unsupported by substantial evidence on the record considered as a whole, involve error of law, or are arbitrary or capricious or constitute an abuse of discretion. Administrative Procedure Act, 5 U.S.C.A. § 1009(e); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1950); *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801, 804 (W.D. N.C. 1944), Aff'd 323 U.S. 678, 65 S. Ct. 277, 89 L. Ed. 550 (1944). It is not the function of this court to appraise the conflicting testimony or other evidence, to judge the credibility of witnesses and to determine the weight of the evidence. A court "cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, that has support in the record and the applicable law." *U.S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536, 66 S. Ct. 687, 90 L. Ed. 821 (1946). But the order must be reversed if the Commission in arriving at its determination departed from the applicable rules of law and if its finding was arbitrary and capricious and had no basis in substantial evidence on the record as a whole.

Plaintiffs contend that the conclusions of the Commission must fall because made under a mistake of law. Specifically, they argue that the Commission's conclusion that the continued operations would constitute "an unjust and undue burden upon the interstate operations of Southern Railroad and upon interstate commerce" was made without considering the over-all prosperity of the carrier and the total operations of the carrier on the line involved, and that in such failure lies error. We think plaintiffs' position is well-taken.

As a matter of law, we think that the ICC cannot be said to have made a proper finding unless it takes into account the profits that the Southern Railway makes in its freight operations on the same intrastate line. *Chicago, M. St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 78 S. Ct. 304, 2 L. Ed. 2d 292 (1958); *Public Service Com. of Utah* v. *United States*, 356 U.S. 421, 78 S. Ct. 796, 2 L. Ed. 2d 886 (1958). Unless this is taken into account, the full weight of the burden placed upon interstate commerce by these intrastate operations cannot be determined. *Chicago* and *Utah* cases, supra. At the time of the decision of the Supreme Court in *Chicago, M. St. P. & P. R. Co.* v. *Illinois*, supra, Title 49 U.S.C. section 13(4) provided that the ICC could change intrastate railway rates where they discriminated against interstate commerce in favor of intrastate commerce. The Supreme Court in the *Chicago* case held that the true nature of the burden on interstate commerce caused by discriminatory rates could not be assessed unless the other revenues in that state were taken into account. As stated by the Supreme Court (P. 305): "the occasion for the exercise of the federal power asserted by section 13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate

share of the revenues necessary to pay a carrier's operating costs and yield a fair return." In order to determine the burdens on interstate commerce caused by an intrastate loss, it is necessary to take into account intrastate profits. Cf. *North Carolina* v. *U.S.*, 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945). If losses in an intrastate operation are so exceeded by profits of intrastate operation of the same general type in the same state, so as to pay operating expenses and yield a high profit, the net effect on interstate operations is not a burden on interstate commerce. If the ICC is then to cut off all of the intrastate operations that suffer a loss, while retaining all others, the result would be to require the intrastate operations to bear more than their share. The intent of Congress was to prevent burdens on interstate commerce, not require tribute therefor.

It must be remembered that the state has a legitimate interest in intrastate commerce—"intrastate rates are primarily the state's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation.' *North Carolina* v. *U.S.*, supra, at 511 * * * [justification for the exercise of this exceptional federal power] must 'clearly appear' ", *Chicago, M. St. P. & P. R. Co.*, supra. To find that segment of intrastate operations represents an ultimate "burden" upon interstate commerce without reference to the question of whether intrastate operations generally on the same line make it such a burden might permit the entire field of intrastate operations to be federally arrogated by a separate treatment of segments unrelated to the net total effects.

The *Chicago* and the *Utah* cases cited above are rate and revenue cases brought under section 13(4) rather

than discontinuance cases under section 13a(2). It is clear, however, that section 13(4) cases furnish analagous authority for section 13a(2) cases. The "unjust and undue burden" standard contained in section 13a(2) derives from section 13(4) of the Act and from judicial decisions relating to the power of the Commission to prescribe intrastate rates which impose an unjust or undue burden on interstate commerce. In section 13a(2) Congress also intended to prevent burdens on interstate commerce by intrastate operations that do not bear their full share of costs and profit. S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), pp. 21–22; H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), pp. 11–12. Indeed, section 13a(2) cases stand in an a fortiori relationship to section 13(4) cases. For to allow passenger service to be abandoned, in this case altogether, as contrasted to raising passenger fares, involves a far more serious incursion upon the traditional rights of the states. See *Southern Railroad Co.* v. *South Carolina Public Service Company*, et al, 31 F. Supp. 707, 710 (E.D. S.C. 1940).

But defendants contend that the authority of the *Chicago* and *Utah* cases cited above has been vitiated by the amendment to section 13(4), 75 Stat. 570, Pub. L. 85–625, section 4, an amendment which was keyed directly to these cases. The amendment was enacted on August 12, 1958; *Chicago* was handed down in January of 1958 and *Utah* in May of 1958. Section 13(4) was amended to allow the ICC to make a determination that intrastate railway rates discriminated against interstate commerce "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the oper-

ations or results thereof of any carrier . . . wholly within any state."[2]

In our opinion, the amendment to section 13(4) does not overturn the existing law applicable to discontinuance cases. Section 13a(2) was enacted at the same time that section 13(4) was amended. At that time, the purpose of amending section 13(4) was fresh in the minds of Congress. If Congress had decided not to require the ICC to take into account the net result of the total operations of the intrastate lines in discontinuance cases as well as rate and revenue cases, it would have been easy to have amended proposed section 13a(2) just as section 13(4) was amended. This was not done.[3]

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[2] Section 13(4) was amended by the addition of the underlined portions:

"Section 13, par. (4) **Duty of Commission where State regulations result in discrimination.** Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice caused any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, *or undue burden on*, interstate or foreign commerce (*which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier or group or groups of carriers wholly within any State*), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, *or burden* * * *."

[3] It has been argued that since Congress amended section 13(4) to add the words "undue burden", and at the same time enacted section 13a(2) using the words "undue burden", Congress intended that the new provisions of section 13(4) were

In any event, all that the major addition to section 13(4) does is to provide that the ICC "may * * * make their determination without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operation or results thereof of any carrier * * * wholly within any state." This seems to mean that the Commission may decide without having to look into the above matter. However, where, as in this case, the matter was presented to the ICC, it would not seem likely that Congress intended the ICC to ignore these factors. The new provision indicates that the ICC may make a decision under section 13(4) without considering the totality of intrastate operations when the facts as to totality of intrastate operations have not been presented to the Commission by the parties. However, where they are presented, they should be taken into account. The permissive phraseology of the section would appear to us to mean that a decision of the Commission will not be upset simply because it fails to find specifically these facts where they have not been put in issue by the evidence before the Commission, but this does not mean that such facts where relevant and pertinent are not to be considered.[4]

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to be applied to section 13a(2). In other words, the argument is that the new addition to section 13(4) became a definition of "undue burden". However, it would appear more likely that the major amendment to section 13(4) was a grant of additional power to the ICC in applying section 13(4), rather than a new definition of "undue burden."

[4] Another possible interpretation of the amendment is that it allows the ICC to make a change in rates without considering the overall statewide totality of a carrier's results—i.e., without considering *all* rates within a state—but does not mean that the totality of operations on the particular line in question should not be considered. See Conf. Report, Administrative News, 85th Cong., 2d Sess., at pp. 3484–5:

"The amendment (to section 13(4)) deals only with the na-

This interpretation of the amendment to section 13(4) is the one adopted by the courts. In *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah 1961), the three judge court stated at p. 18 that "We believe that a matter of procedure rather than any substantive change in the basic transportation policy of the Congress is involved [in the amendment.] If this were not so, serious conceptual and constitutional, and further practical difficulties, would be invited * * *. The legislative history of the amendment bolsters this view." *Utah* was affirmed per curiam in 365 U.S. 649, 81 S. Ct. 834, 5 L. Ed. 2d 857 (1961).

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ture of the evidence to support such a finding. By two recent decisions of the Supreme Court (*Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *State of Illinois* (January 13, 1958), 355 U.S. 300, 356 U.S. 906, 78 S. Ct. 304, 665, and *Public Service Commission of Utah* v. *United States* (May 19, 1958), 356 U.S. 421, 78 S. Ct. 796, 2 L. Ed. 2d 886), the Commission is required to consider the entire State operation, freight and passenger, in determining whether or not the intrastate freight rates were causing an undue revenue discrimination against interstate commerce. If the holdings in these cases mean that the required finding—of undue, unreasonable, or unjust discrimination against or undue burden on, interstate or foreign commerce—can be made only in the light of the overall statewide totality of a carrier's operating results derived from its entire body of rates applicable within the State, it would preclude the Commission from making such a finding on a showing of only the effect of the particular rate or rates in question. The Commission could not, under such an interpretation, continue to function effectively in removing unjust discrimination against interstate commerce caused by interstate rates and charges * * *. The above three amendments to paragraph (4) of section 13 do not vest the Commission with jurisdiction that it does not have today but deal with procedures in the exercise of that jurisdiction better to strengthen the protection of interstate commerce as designed in this provision of the act."

It would, therefore, appear that when making a determination under section 13a(2) to discontinue one type of service on a line, where such facts are pertinent and relevant, and especially when such facts are before the Commission, the ICC must take into account the revenues from all services on the line. Without taking this into account, an interference of this nature into the completely intrastate affairs of any state based upon the burden that state has placed upon interstate commerce cannot be supported.

Both the Trial Examiner's Report and the decision of the ICC below indicate that they did not take this factor into account. The following appears at pages 11 and 12 of the Examiner's Report:

> "At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,699, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the overall prosperity of the petitioner, as well as its intrastate freight operations, must be given effect in the disposition of the issues involved herein. With these contentions, the examiner disagrees."

On appeal, Division 3 of the ICC followed the Examiner's position (at pp. 4, 5):

> "But, interveners argue, petitioner's net income from freight traffic over the line is such that overall profitable operations result therefrom. It is their contention therefore, that the operation between Greensboro and Goldsboro cannot be held to be a burden upon interstate commerce. Their conclusion is that any application of section 13a(2) to a situation where an overall profitable operation is held to be a burden on interstate commerce results in an

> unconstitutional application of the provisions of the statute. In short, interveners allege that petitioner's net income from its freight operations over the line must be given effect when considering whether the continued operation of its passenger trains Nos. 13 and 16 will constitute a burden on interstate commerce. We think that such premise is contrary to the intent of Congress under the statute here involved. By analogy, interveners' view would require a determination that overall losses have resulted on traffic handled over the line. In that instance, however, petitioner could obtain adequate relief under the abandonment provisions of section 1(18) of the Act."

The ICC then states the rule to be as follows (p. 5):[3]

> "Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposed an unjust *and undue burden on interstate commerce.* To hold otherwise would be contrary to the apparent intent of the Congress."

The examiner and the ICC have misconstrued the intent of Congress and the contentions of the plaintiffs, as well as the applicable law. It is a non-sequitur to say that "by analogy, interveners' plaintiffs view would require a determination that overall losses have resulted on traffic handled over the line." Plaintiffs do not contend—and it is not the law—that there can be no discontinuance unless freight and

[3] Quoting from *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles*, etc., 312 ICC 631.

passenger service considered together show a net loss. Rather, plaintiffs' contention is that the $630,000 freight profit is a factor to be considered in determining whether the $90,000 passenger loss on the same line constitutes an unjust and undue burden on interstate commerce. Whether there is a net profit or net loss is not necessarily the controlling factor, but the amount of the net profit or net loss is a factor to be considered. Whether the operation of the passenger service is a burden on interstate commerce and whether there is any longer a public need sufficient to justify the financial losses involved are questions not susceptible of scientific measurement or exact formulae but are questions of degree and involve the balancing of conflicting interests. All material factors bearing on the questions must be taken into account, the ICC must consider a fair picture.[6] Because Congress has

[6] See *Colorado* v. *United States*, 271 U.S. 153, 168–9, 70 L. Ed. 878, 885, (Brandeis, J): "In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

expressed concern over the financial conditions of railway passenger service does not justify a reading of their intent to mean that if a segment of passenger service shows a loss, it is unnecessary to consider all other relevant factors, including the freight profits on the same line, to determine whether the loss constitutes a burden on interstate commerce.[7]

We hold, then, that the Commission should have considered the relative amount of profit on one service and loss on the other in making its finding of whether the pasenger service here involved constituted an undue burden on interstate commerce.

SUBSTANTIAL EVIDENCE ON THE RECORD

In order to allow discontinuance under section 13a (2) the Commission must find, based on substantial evidence on the record as a whole, that (a) the present or future public convenience and necessity permit of such discontinuance, and (b) the continued operation or service without discontinuance in whole or in part, will constitute an unjust and undue burden upon the interstate operation of such carrier or upon interstate commerce. Title 49 USC, section 13a(2).

The use of the words "undue" and "unjust" must mean that there are permissible burdens, that is, "due" and "just" burdens. There is an interrelation between findings (a) and (b). To make a determination, the Commission must weigh the public convenience and necessity against the burdens.

What then is the public convenience and necessity to be served by this railroad.

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[7] All relevant factors are considered in fixing freight rates. Southern has received six increases in freight rates since 1951, in all of which the size of passenger deficits were taken into account. ICC Record, Vol. 11, pp. 197–200.

The record discloses that the two trains in question are the last remaining east-west passenger trains between Goldsboro and Greensboro, North Carolina. Until September 1954 Southern operated three pairs of passenger trains on this line. One pair of trains was discontinued in 1954 and another pair in 1958 which reduced the passenger service to trains Nos. 13 and 16 which are involved in this proceeding. The principal public convenience presently afforded by these trains arises from the inter-connecting service at Greensboro with north-south trains on Southern's main line. The pullman service furnishes convenient overnight travel to New York and other East Coast cities, allowing a full working day to the traveler and thus conserving work time. A number of witnesses pointed out the superior convenience of this service to travel by air.

The City of Durham has the largest natural interest in the use of the trains, 46% of the passengers embarking or leaving the trains there. This city has a population of 78,302. A witness for the railroad could recall only five cities in the United States with a population in excess of 70,000 that are without rail passenger service. The discontinuance of these trains would leave Durham County (1960 population 111,995), Alamance County (1960 population 85,674), and Orange County (1960 population 42,970) without any rail passenger service.[6] These three counties with a total population of 240,639 are located in the industrial Piedmont section of North Carolina.

The witnesses who testified at the hearings as to the need of these trains included:

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[6] Fifty of North Carolina's 100 counties are without passenger rail service. Durham County is ⅓ larger in population than the largest county without such service. Record before North Carolina Supreme Court, p. 259.

1. Four members of the U.S. Army assigned to the Office of Ordnance Research located at Duke University who testified that the continuation of the trains was necessary for the satisfactory performance of their duties (relating to anti-missile missile work). Their individual annual use of the train was fifteen to twenty trips a year.

2. Two students at Duke University testified as to their and other students' use and need of the trains.

3. Professors from Duke University and the University of North Carolina who testified as to the need of the trains in carrying on their duties.

4. Patients at Duke Hospital who testified as to the medical necessity of the trains in getting to and from their home in New York to the hospital.

5. Testimony of a research chemist from Philadelphia, Pennsylvania, as to his use and need for the transportation.

6. A textile executive from New York City whose company owns a mill in Durham testified as to his necessity for the use of the trains.

7. The Director of Transportation for Burlington Industries, Inc., Burlington, North Carolina, testified as to the need for the trains both for employees of the company and for buyers, suppliers and technical people visiting the plants of the company.*

8. The President of the Research Triangle Institute, a recently established nonprofit or-

* 30–40 employees of Burlington Industries are "regular" users, averaging approximately one trip a month each. Customers and buyers (especially women buyers) also use the train. Burlington Industries has assisted Southern in the removal of other schedules and originally did not protest the discontinuance involved here. Subsequent studies of the company needs caused Burlington to reverse its position. ICC Record, Vol. 111, pp. 374–6.

ganization providing research service to corporations, governmental agencies and foundations, testified as to the use and need of the trains by his staff, and that the continued operation of the trains was extremely important to the proper functions of his organization. The Institute staff consists of 86 full time members today; it is anticipated that this figure will be 170 by the end of 1962.

9. The President of the Golden Belt Manufacturing Company of Durham testified as to his use and need of the train. This witness explained the necessity for train travel in the operation of his business.

10. The president of the Burlington Chamber of Commerce testified that rail passenger service was instrumental in the growth of Burlington and that the discontinuance of trains would seriously handicap the area.

11. A Burlington Executive testified as to the need for the trains by himself, his buyers, and his customers.

12. The Dean of Trinity College of Duke University, who made twenty to twenty-five trips a year himself, testified as to the need and convenience of the trains.

13. The Secretary of the Committee on Educational Institutions of the Duke Endowment testified that his work required use of these trains.

14. A Professor of Physics and a Member of the Advisory Committee of Reactor Safeguards, a part of the Atomic Energy Commission, testified that his work required the use of the trains at an average rate of a trip per month.

15. The President of Duke University testified to his use of the trains and that of his trustees and that their continuance was a matter of convenience and necessity. (He had made five trips to New York since the first of the year.)

16. The General Manager of the Jack Tar Hotel in Durham testified that the continued operations of the trains serve a necessary and convenient purpose for the guests who stay at his hotel and that the removal of the trains would not only be detrimental to efforts to attract conventions to Durham, but would inconvenience those persons attending such conventions.

17. The Director of Durham's Committee of 100 testified as to the need of the trains in locating and retaining industry in the Durham area.

18. The President of the Southerland Dye and Finishing Plant in Mebane, North Carolina, testified as to his use of the trains and their need in his area.

19. The Office Manager of the Belk Leggett Department Store in Durham testified as to his store's need of the trains for sending buyers to New York. The buyers consist of a group of four to six people going to New York once a month, ten months out of the year.

20. There was evidence of the need of the service in the industrial development of the area from Justin Kingston, a New York textile executive, now building a plant in Durham to employ two hundred to three hundred employees; from the Director of Transportation for Burlington Industries; from George Watts Hill, Chairman of the Board of the Home Security Life Insurance Company and of the Durham Bank and Trust Company, and numerous others. In addition, one witness, Dr. Thomas Powell, a man with an investment of a million dollars in the biological supply business in Elon, North Carolina, testified that the loss of rail passenger service might cause that business to leave North Carolina.

21. Evidence indicated that there are three universities in or near Durham, two in Dur-

ham, one in Chapel Hill in Orange County). A total of 14,737 students attended these institutions in 1958–9 and attendance is steadily increasing. There are eight hospitals located in or near Durham. Six are within ten minutes by ambulance or auto from the Durham railroad passenger service. The other two, Butner and Memorial Hospital are within twenty to twenty-five minutes. These hospitals treated a total of over 431,000 patients in 1959.

To summarize, in addition to the need for the services by the general public, the testimony indicated the need existed as to four principal areas: industry, hospitals, Duke University, and the U.S. Army.

The record indicates that the trains serve a growing area. The Durham-Burlington area is already heavily industrialized, with Burlington Mills and Western Electric predominating in Burlington, and the cigarette industry in Durham. In addition, in the opinion of Southern's General Industrial Agent "this area holds great promise in the field of industrial development * * * the new Research Triangle will give tremendous impetus to this growth and create ever-increasing industrial interest in this section." (Southern's freight traffic on the Greensboro-Goldsboro line may be expected to benefit accordingly.)

That this is a growing area would be meaningless if the growth was not reflected in increasing use of the trains. Southern points to a very large decline in passengers from the year 1948 (an average of 77.51 per trip) to 1960 (an average of 20.2 per trip). This decline would seem to reflect the general revolution in transportation caused by the shift in travel from railways to air, bus, and private car. This decline appears to have bottomed out, however, and recent

figures indicate that the use of the trains is increasing with the growth of the area:

PASSENGERS[1]

	1959	1960	1961 (5 months)
Total	14,251	14,776	8,894
Daily average	19.5	20.2	29.6
Average passenger mile per train mile[2]	6.82	7.23	9.97

[1] These figures do not include any pass riders, which were estimated at the hearing before the State Utilities Commission at 9% of the total passengers.

[2] The evidence does not disclose the average number of passengers per train mile on the 55 mile portion of the line between Greensboro and Durham, although the principal public convenience presently afforded by trains Nos. 13 and 16 related to travel between these two cities. The line between Greensboro and Goldsboro is 139 miles long.

We note that the statute refers to "the present or *future* public convenience and necessity."

The increase in use may not be substantial (although it represents an increase of nearly 60% in the daily average number of passengers patronizing these trains in the first five months of 1961 as compared with the entire year of 1959), but must be viewed in the light of Southern's failure to seek passengers. Plaintiffs accuse Southern of making a deliberate effort to discourage passenger service on the trains. Be that as it may, there is considerable evidence that Southern has done little, if anything, to promote greater use of these trains. The last advertising for the service before the commencement of these hearings occurred in 1951;[10] the president of the Research Triangle Institute testified that his associates did not know of the service until he told them. In contrast, there was testimony that Seaboard, with reference to its Raleigh service, actively advertised and solicited patronage and operated a well-staffed passenger office.

[10] Six advertisements appeared in the Durham paper in 1960. ICC Record, Vol. 111, pp. 308, 335. The hearing before the North Carolina Public Utilities Commission was on Oct. 6, 1959, and the decision was handed down on January 20, 1960.

The ICC emphasized the availability of other means of travel to serve this area. There is good bus and air service, and the number of private automobiles is larger than the state-wide average. The fact of other methods of travel is a factor to be considered but it is not decisive. The statute speaks of convenience as well as of necessity. Also, the existence of *alternative* modes of travel in a heavily populated area should be considered a "convenience", and under some circumstances (such as air line strikes and bad weather) a "necessity."

What are the burdens imposed on interstate commerce by the operation of the trains?

The ICC found that the carrier's annual out-of-pocket savings resulting from the discontinuance of the two trains would exceed $90,000 each year.[11] On this same line of track the railroad made a net freight operating profit of $630,000 in 1960.

Taking into account total operation of this line, there is a profit not a loss, a benefit, not a burden.

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[11] Plaintiffs contended that the maximum out-of-pocket loss was only $33,688 in 1960, while Southern contended it would exceed $117,640. The difference is largely accounted for by plaintiffs' giving effect to the 58 percent state and federal income tax deduction resulting from the deficit operation, on the ground that this is a cost borne by the state and national governments and thus would not affect the financial condition of the railroad itself and therefore could not affect interstate commerce by weakening the railroad's capital structure. But uneconomical transportation is not rendered less so by passing a portion of the burden to Federal and State governments in the form of reduced income taxes "* * * an uneconomic outlay of funds would not be in the interest of transportation even though the money be derived from the national government." *Purcell* v. *United States*, 315 U.S. 381, 385 (1942). As far as the effect of the deficit operation on the shareholders and the financial structure of Southern is concerned, however, the argument carries weight.

The relative amount of profit on one service and loss on the other is a factor.

When we turn from this particular line to the over-all operations of Southern Railway, we find that the over-all profit of Southern Railway in 1960 for its entire system was $30,702,542 after the payment of all taxes and all operating expenses. The figure for 1958 was $30,254,231 and for 1959 was $33,126,744.[12] The accumulated surplus of Southern in 1960 was $343,594,070. The effect of the losses of the Greensboro-Goldsboro passenger service on the financial structure of the railroad is inconsequential.[13] The degree by which the loss impairs the ability of the carrier properly to serve interstate commerce is not substantial.

But it is unfair to compare the loss from a particular segment of a passenger rail line to the total profit of the company. Nor is this the test. The question is whether the particular segment of the railway involved is contributing its fair share to the over-all company operations, or whether its share constitutes a burden on the company and on interstate commerce. The evidence in the record is not clear or full on the question of whether this segment of the line is contributing its fair share to the over-all company operations, but the evidence points in the direction that the Greensboro-Goldsboro line contributes at least its fair share. For example, Southern's over-all passenger deficit in 1960 was $14,669,798 on its 2,913 passenger miles. The average loss per mile is then $5,035 on a system-wide basis. If we assume Southern's net operating passenger deficit on the Greensboro-Goldsboro line was $117,641 for 1960 (on a line of 130 miles);

[12] ICC Record, Vol. 11, p. 202.

[13] As to its effect on shareholders, the loss in 1960 reduced net profits by .0016% (after giving effect to state and federal income tax deductions).

then the average loss per mile was $912.[14] The evidence further indicates that the average revenue per passenger mile in 1960 was .0305 for trains Nos. 13 and 16, as compared with a company-wide average of .0296 and a North Carolina average of .0301, indicating a greater revenue per passenger mile on the Greensboro-Goldsboro line than on the Southern's operations as a whole.[15]

We find no comparative figures relating to freight profits in the record. The amount of the freight profits on the Greensboro-Goldsboro line was apparently arrived at by taking 61% of the Southern Railway's average freight profits per mile multiplied by the total Greensboro-Goldsboro mileage.

The burdens of a public utility must be viewed in light of the principle that a public utility cannot shut off all unprofitable service—it must continue to serve, even at a loss as to some operations when the public convenience and necessity do not permit the loss of the service. Mr. Justice Frankfurter, in *Ala. Public Serv. Com.* v. *Southern Ry Co.*, 341 U.S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 puts it:

> "Unlike a department store or grocery store, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable * * *. One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of

[14] This figure is only approximate. Mr. Gleason testified that the $14,669,798 included all losses while the $117,641 was only the out of pocket losses resulting solely from the trains' operations. ICC Record, Vol. 11, pp. 209–211.

[15] For the first five months of 1961, the Greensboro-Goldsboro figures had fallen to .0274 compared to a company average of .0300. We find no figures for other years. ICC Record, Vol. 11, pp. 164–5.

> the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided because it will be attended by some pecuniary loss."

Upon our examination of the entire record, in the light of the applicable principles of law, we fail to find substantial evidential facts to support the Commission's holding that the service in question constitutes an undue burden on the interstate aspects of the carrier's operations. The basic facts are not in conflict—nor is there any real conflict in the evidence offered by the parties. The question is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 205, 217, 83 L. Ed. 126 (1933); Davis, *Administrative Law Treatise*, Vol. 4, p. 186. We think there is not.

This court is specifically authorized by the Administrative Procedure Act (5 U.S.C.A. 1009) to "hold unlawful and set aside agency action findings and conclusions found to be arbitrary, capricious * * * or otherwise not in accordance with law * * * (or) unsupported by substantial evidence." By the provisions of Title 28, sec. 1336, jurisdiction is accorded to "set aside (or) annul any order of the Interstate Commerce Commission."

Pursuant to this authority, we hold unlawful and set aside the action of the Interstate Commerce Commission authorizing the carrier to abandon its passenger service. We also hold unlawful and set aside the ultimate conclusions of the Interstate Commerce Commission that the service in question constitutes an undue burden on interstate commerce and that the

present or future public convenience and necessity permits such discontinuance. We hold that such action and conclusions are arbitrary and capricious because not in accordance with law and because not supported by substantial evidence.

We do not invalidate and do not set aside any of the subsidiary findings of fact made by the agency. Since we accord to them administrative finality, and since the record is complete bearing upon all aspects of the controversy, there would appear to be no occasion for remand. The procedure of remanding to an administrative agency is to afford the agency an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings, or supplying findings validly made to take the place of those invalidated.[16] None of these purposes would be served by remanding this case to the Interstate Commerce Commission for the simple reason that we have noted no irregularities in procedure and no important deficiencies in the record, and for the additional reason that we have invalidated no subsidiary findings of fact but only ultimate conclusions of law and agency action.

Judgment for Plaintiffs.

U.S. Circuit Judge

U.S. District Judge

U.S. District Judge

OCTOBER —, 1962.

[16] 2 Am. Jur. 2d, "Administrative Law", sec. 764.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION

C-158-D-62

STATE OF NORTH CAROLINA, ET AL.

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ORDER

The above entitled cause coming on to be heard on the 13th day of September, 1962, and all parties thereto having appeared by counsel, and the court having hear the arguments of counsel and having reviewed the record, and upon due consideration thereof it appearing to the court that the plaintiffs should be granted the relief prayed for in their complaint, it is therefore on this the 19th day of October, 1962,

Ordered, Adjudged and Decreed that the Order of the Interstate Commerce Commission be set aside and that the defendant, Southern Railway Company, its officers, agents and employees, be permanently and perpetually enjoined and restrained from discontinuing passenger trains, nos. 13 and 16 between Greensboro and Goldsboro, North Carolina.

The defendant, Southern Railway Company has until 12:00 noon, 24th day of October, 1962, in which to comply with this order.

It is further Ordered, Adjudged and Decreed that the defendant, Southern Railway Company, pay the costs of these proceedings to be taxed by the Clerk of this court.

U.S. Circuit Judge

U.S. District Judge

U.S. District Judge

OCTOBER 19, 1962.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21563

Service Date July 2, 1962

SOUTHERN RAILWAY COMPANY DISCONTINUANCE OF SERVICE BETWEEN GREENSBORO AND GOLDSBORO, N.C.

Decided June 27, 1962

Order issued granting petition of Southern Railway Company to discontinue the operation of trains 13 and 16 between Greensboro and Goldsboro, N.C.

Arthur J. Dixon and *Earl E. Eisenhart* for Southern Railway Company.

F. Kent Burns for State of North Carolina and North Carolina Utilities Commission.

Robert B. Holton, W. J. Burton, Jr., and *R. L. Carnes* for railway labor organizations, protestants.

Claude V. Jones, Victor S. Bryant, E. C. Bryson, E. C. Brooks, Jr., A. H. Graham, Jr., and *Francis E. Walker* for other protestants.

REPORT OF THE COMMISSION

Division 3, Commissioners TUGGLE, HUTCHINSON AND GOFF

GOFF, Commissioner:

Exceptions to the report of the hearing examiner recommending the granting of the petition have been filed jointly by the State of North Carolina, the North

Carolina Utilities Commission, Duke University, Mrs. Mary Trent Seamons, Research Triangle Institute, and Erwin Mills, Inc., all interveners in opposition. Petitioner, Southern Railway Company has replied thereto. Oral argument requested by the interveners was denied by order of the Commission, Commissioner Tuggle dated February 12, 1962, served February 16, 1962.

By petition filed April 6, 1961, the Southern Railway Company, herein called petitioner or the carrier, a common carrier by railroad subject to Part I of the Interstate Commerce Act, requests authority under section 13a(2) of the act to discontinue the operation of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N.C. A hearing was held in Raleigh, N.C., of which the Governor of the State of North Carolina and the North Carolina Utilities Commission had notice. Briefs were filed and a report and recommended order by the hearing examiner was served on October 27, 1961. We are in accord with the examiner's findings of fact and ultimate conclusions thereon which we hereby adopt as our own and will not restate herein except to the extent necessary for clarity of discussion. However, we believe that we should set forth our views on certain of the issues presented.

Prior to the filing of the petition with this Commission, the carrier on July 8, 1959, filed an application with the North Carolina Utilities Commission for authority to discontinue the operation of the same trains in question here. After hearing, the North Carolina Commission concluded that there was insufficient competent evidence in the record upon which to base a finding that public convenience and necessity for the continuance of the trains no longer exists and thereupon issued its order of January 20, 1960,

denying the application. On appeal, a judgment of the Superior Court of Wake County, N.C., sustaining the order of the North Carolina Utilities Commission, was affirmed by the North Carolina Supreme Court on February 3, 1961. *State of North Carolina, ex rel. Utilities Commission et al.* v. *Southern Railway Company,* 254 N.C. 73.

With this history of adjudication of the State proceeding in support of their argument, interveners at the hearing on the petition before us moved for dismissal asserting that the action is *res judicata.* The examiner has recommended that the motion be overruled and interveners on exceptions, contend error, reasoning that the issue of public convenience and necessity had been clearly litigated between the parties in the prior proceeding and was finally determined by a court of competent jurisdiction when the Supreme Court of North Carolina issued its decision on February 3, 1961, affirming the findings of the Superior Court.

We certainly do not question either the competency or jurisdiction of the North Carolina Utilities Commission or the Supreme Court of that State in the prior proceeding and respect their decision in that matter. We also recognize the finality of the Court's decision on questions within its judicial sphere. However, the issue before us on petition by Southern is whether public convenience and necessity permits the discontinuance of operation of the trains in interstate commerce, a question arising under a Federal Statute (section 13a(2) of the Interstate Commerce Act). Proceedings of this nature are not dissimilar to abandonment proceedings presented before us. Of the latter cases, Justice Brandeis, speaking for the United States Supreme Court in *State of Colorado* v. *United States* 271 U.S. 153, 165–166 said:

> Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment of the particular case. The authority to find the acts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

It follows that the question of public convenience and necessity as it affects interstate commerce and which is presently before us was not determined in the prior State proceeding and the doctrine of *res judicata* obviously is not applicable to the newly created legal situation. Accordingly, the motion is denied.

Interveners allege further error by the examiner in recommending that 2 other motions to dismiss the petition be overruled, namely (1) that section 13a(2) of the Act is unconstitutional on its face and in its application; and (2) that petitioner failed to meet the applicable regulations regarding proper notice to the public.

As the examiner has pointed out, it is well established that an administrative agency is without power to pass upon the constitutionality of a federal statute which it is called upon to administer. See *Engineers Public Service Co.* v. *SEC*, 78 U.S. App. D.C. 199, 138 F. 2d 936, 952–953, dismissed as moot 332, U.S. 788; *Paintz* v. *District of Columbia*, 72 App. D.C. 131, 112 F. 23, 39; *Todd* v. *SEC*, 137 F. 2d 475, 478

(6th Cir.); *Central Nebraska Public Power & Irr. Dist.* v. *FPC*, 160 F. 2d 782 (8th Cir.), certiorari denied 332 U.S. 765; and *Public Utilities Commission* v. *United States*, 355 U.S. 534, 539. But, interveners argue, petitioner's net income from freight traffic over the line is such that overall profitable operations result therefrom. It is their contention therefore, that the operation between Greensboro and Goldsboro cannot be held to be a burden upon interstate commerce. Their conclusion is that any application of section 13a(2) to a situation where an overall profitable operation is held to be a burden on interstate commerce results in an unconstitutional application of the provisions of the statute. In short, interveners allege that petitioner's net income from its freight operations over the line must be given affect when considering whether the continued operation of its passenger trains Nos. 13 and 16 will constitute a burden on interstate commerce. We think that such premise is contrary to the intent of Congress under the statute here involved. By analogy, interveners' view would require a determination that overall losses have resulted on traffic handled over the line. In that instance, however, petitioner could obtain adequate relief under the abandonment provisions of section 1(18) of the Act. Section 13a(2) specifically empowers the Commission to authorize the discontinuance of trains upon finding that (a) the present and future public convenience and necessity permit of such discontinuance or change in whole or in part of the operation or service of *such train* or *ferry*, and (b) the continued operation or service of *such train* or *ferry* without discontinuance or change, in whole or part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate comemrce. [Underscoring supplied.]

The legislative history of section 13a(2) indicates that the purpose thereof is to permit the discontinuance of the operation of services that "no longer pay their way and for which there is no longer any public need to justify the heavy financial losses involved." (S. Rep. 1647, 85th Cong.). [Emphasis supplied.] In considering a somewhat similar contention, in *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc.*, 312 I.C.C. 631, we stated:

> "Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

Nothing has been submitted herein to warrant a change in this view.

Nor can we agree with interveners that the petition in this proceeding should be dismissed for petitioner's failure to observe the rule included in our order of November 12, 1959, requiring the posting of notice of the proposed discontinuance in each station, depot or other facility involved. While the statute clearly requires such posting of notice in proceedings instituted under section 13a(1), the statute is equally clear in not providing for such requirement under paragraph 2:

> "When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least 30 days in advance of the hearing provided for in this paragraph, and such hearing

shall be held by the Commission in the State in which such train or ferry is operated; * * *."

It is further apparent that the inclusion of the requirement regarding the posting of notice in our order of November 12, 1959, and the resultant conflict between that order and section 13a(2) was caused by an obvious error in not amending section 43.6 to conform to the relettering of section 43.5 of our order[1] of the above date. Since petitioner complied with the rules and regulations promulgated by our order of August 14, 1958, and since there was no intent that our subsequent amending order of November 12, 1959, impose an additional requirement regarding notice upon petitioners in proceedings under section 13a(2), and since no specific evidence has been introduced to show that the position of any of the parties has been prejudiced or materially affected by our error, the motion of interveners is denied.

Interveners' exceptions include other assignments of error to the examiner (1) in computing the revenues and expenses of operation of the trains involved, (2) in failing to give sufficient weight to the overall prosperity of the petitioner when considering whether continuance of the operation would constitute an undue burden on interstate commerce, (3) in failing to consider the increase in the average number of patrons in 1960 and the period of 1961 over the number of passengers utilizing the service in 1959, (4) in failing to recognize that petitioner had allowed service along and over the line to decline in order to present a plausible case for the abandonment of passenger service, and (5) in concluding that future industrial expansion of

[1] This oversight was corrected by the issuance of the Commission's order of November 28, 1961 (Ex Parte No. 217) in which section 43.6 was amended to eliminate reference to paragraph (j) of section 43.5.

the area is not dependent upon existing rail passenger service.

In his determination of the financial results of operation the examiner has allowed or disallowed certain items of expense consistent with our prior decisions in similar discontinuance proceedings. Interveners have assailed the methods utilized in approximating certain cost items where the actual expense cannot be determined. However, they have offered no substitute formula whereby a more accurate determination may be made. Under the circumstances we will rely on the methods which have been acceptable to us in the past.

The contention that the overall prosperity of the petitioners must be given effect in the disposition of the issues involved herein has been adequately discussed in our consideration of one of interveners' motions and no further clarification of our position in that matter is necessary.

The fact has not been overlooked that there has been an increase of nearly 50 percent in the daily average number of passengers patronizing these trains in the first 5 months of 1961. The record also discloses that the increase in the 1961 period was due largely to an increased number of group movements of school children. However, despite the increase in patronage during the first 5 months of 1961, passenger revenues during that period amounted to only $10,653 or approximately $26,000 less than train and engine crew wages.

The evidence of record fails to support interveners' contention that petitioner has deliberately discouraged the use of the trains as a part of its plan to present a plausible case for discontinuing passenger service over the line. Neither the present nor prospective traffic on the line would justify the use of expensive or ultramodern equipment and, as stated by

the examiner, we have repeatedly held that prospective patrons who must be coaxed to use a service have no urgent need for it.

We have also expressed the view that while industrial expansion may, under certain circumstances, depend upon the existence of rail passenger service, it would appear that prospective industries are much more interested in freight service than rail passenger facilities. See *Chicago, M. St. P. & P. R. Co. Discontinuance of Service*, 307 I.C.C. 565, 578 and *Chicago & N. W. Ry. Co. Discontinuance of Service*, 307 I.C.C. 775, 782.

From a review of the evidence of record we conclude that the cost to the carrier of operating the trains involved greatly exceeds the benefit derived from said trains by the traveling public; that existing alternate transportation service by rail, bus, airline and motor truck are reasonably adequate for the transportation of passengers, and express; that the public will not be materially inconvenienced by the discontinuance of the service here involved; that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remain in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce.

We have heretofore concluded that we have no authority under section 13a(2) to impose conditions for the protection of rail employees adversely affected by the discontinuance. While it is recognized that the probable adverse effect upon employees is a factor to be considered in determining public convenience, such probable adverse effect in the present

proceeding does not affort a sufficient basis to justify continued operations of the involved trains.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and found to be without material significance or not justified.

We find that the present and future public convenience and necessity permit the discontinuance of service by the Southern Railway Company of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N.C., and that the continued operation thereof would constitute an unjust and undue burden upon the interstate operations of that carrier and upon interstate commerce.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 27th day of June, A.D. 1962.

Finance Docket No. 21563

SOUTHERN RAILWAY COMPANY DISCONTINUANCE OF SERVICE BETWEEN GREENSBORO AND GOLDSBORO, N.C.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions of law, which report is hereby referred to and made a part hereof:

It is ordered, That interveners' motions to dismiss the proceeding be, and they are hereby denied.

It is further ordered, That the petition of the Southern Railway Company to discontinue the operation of the passenger trains specified in the aforesaid report be, and it is hereby, granted.

It is further ordered, That this order shall be effective 20 days from the date of service hereof; and

It is further ordered, That if the authority herein granted is not exercised within one year from the effective date thereof, it shall be of no further force or effect.

By the Commission, division 3.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Served October 27, 1961

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., and served on all other parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

Finance Docket No. 21563

SOUTHERN RAILWAY COMPANY DISCONTINUANCE OF SERVICE BETWEEN GREENSBORO AND GOLDSBORO, N.C.

Decided —

(1) Motions of protestants to dismiss proceeding overruled.

(2) Order granting petition of Southern Railway Company to discontinue the operation of trains 13

and 16 between Greensboro and Goldsboro, N.C.

Arthur J. Dixon and *Earl E. Eisenhart* for Southern Railway Company.

F. Kent Burns for State of North Carolina and North Carolina Utilities Commission.

Robert B. Holton, W. J. Burton, Jr., and *R. L. Carnes* for railway labor organizations, protestants.

Claude V. Jones, Victor S. Bryant, E. C. Bryson, E. C. Brooks, Jr., A. H. Graham, Jr., and *Francis E. Walker* for other protestants.

REPORT AND ORDER RECOMMENDED BY WILLIAM J. GIBBONS, HEARING EXAMINER

On April 6, 1961, the Southern Railway Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, filed a petition under section 13a(2) of the Act for authority to discontinue the operation of trains Nos. 13 and 16 between Greensboro and Goldsboro, N.C. A hearing was held in Raleigh, N.C. on July 11 through July 14, 1961, of which the Governor of the State of North Carolina and the North Carolina Utilities Commission had notice. The Southern Railway Company will be referred to herein as the "petitioner," the railway labor organizations and their representatives as "employees," and all other parties, including the State of North Carolina and the North Carolina Utilities Commission, will be referred to as "protestants." The proceeding has been referred to the examiner who presided at the hearing for a recommended report and order. Briefs have been filed.

On July 8, 1959, the Southern Railway Company filed an application with the North Carolina Utilities Commission for authority to discontinue the operation of the same trains that are involved in this proceeding. After hearing, the North Carolina Commission

issued its order dated January 20, 1960, denying the application. On appeal, a judgment of the Superior Court of Wake County, N.C., affirming the order of the North Carolina Utilities Commission, was affirmed by the North Carolina Supreme Court on February 3, 1961. *State of North Carolina, ex rel. Utilities Commission et al* v. *Southern Railway Company*, 254 N.C. 73.

At the outset of the hearing, protestants filed three separate motions to dismiss the proceeding on the grounds that (1) section 13a(2) is unconstitutional, (2) the decision of the Supreme Court of North Carolina which sustained the order of the State Commission is res judicata, and (3) no proper notice of the hearing was given as required by law.

It is well established that an administrative agency is without power to pass upon the constitutionality of a federal statute which it is called upon to administer. See *Engineers Public Service Co.* v. *SEC*, 78 U.S. App. D.C. 199, 138 F. 2d 936, 952–953, dismissed as moot 332 U.S. 788; *Panitz* v. *District of Columbia*, 72 App. D.C. 131, 112 F. 23, 39; *Todd* v. *SEC*, 137 F. 2d. 475, 478 (6th Cir.); *Central Nebraska Public Power & Irr. Dist.* v. *FPC*, 160 F. 2d 782 (8th Cir.) certiorari denied 332 U.S. 765; and *Public Utilities Commission* v. *United States*, 355 U.S. 534, 539.

With respect to the second motion to dismiss, it is the position of protestants that the matter has been conclusively adjudicated by a court of competent jurisdiction and that all parties are bound by such determination in the absence of an allegation or showing of a change of conditions, and since no change in conditions has been alleged or shown, the decision of the Supreme Court of North Carolina, *supra*, is res judicata.

In the past, this Commission has superseded court decisions when the applicable statute clearly indicated that it should do so. *Chicago, S.S. & S.B.R.* 234 I.C.C. 34; *Street Elect. Ry. & M. Coach Employees* v. *C.A. & E.R. Co.* 234 I.C.C. 301; and *Sprague* v. *Woll*, 122 F. 2d 128, certiorari denied 314 U.S. 669. The jurisdiction of this Commission over the subject matter of this proceeding has been established by virtue of the denial of petitioner's application by the North Carolina Commission and the subsequent filing by petitioner of the petition herein. After the jurisdiction of this Commission has been properly invoked, section 13a(2) contemplates that the matter be tried de novo and that the prior determination by the appropriate State authority is of an advisory nature only, having no binding effect upon this Commission.[1] To hold otherwise would render section 13a(2) ineffectual or wholly inoperative. Moreover, section 13a (2) raises an issue with respect to the burden on interstate commerce, an issue which neither the North Carolina Commission nor the North Carolina Supreme Court was empowered to determine. The doctrine of res judicata does not preclude relitigation when a new or different claim or issue is presented. For the above reasons, the examiner concludes that this Commission is not bound by the order of the North Carolina Commission or by the State Court decisions which affirmed that order.

Protestant's third motion to dismiss is based upon the ground that petitioner did not post notices of its proposed discontinuance in its stations, depots and passenger cars as required by law. In support of this

[1] Section 13a(2) provides, among other things, that this Commission "is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph."

motion, they contend that the applicable regulations (49 CFR 43.1) specifically state that the rules apply to a "notice" under section 13a(1) of the Act, or to a "petition" under section 13a(2), and further that section 43.5(j) of the regulations requires that a copy of the notice of the proposed discontinuance be posted "in a conspicuous place in each station, depot or other facility involved, including each ferry and each passenger car * * *" (49 CFR 43.5(j)).

It is to be observed that the regulations define the term "notice" as a notice provided for in section 13a(1) of the Act, and the term "petition" as a petition filed under section 13a(2). (49 CFR 43.2.) Section 43.5 of the regulations, paragraphs (a) through (k), specifically applies to a "notice" in a section 13a(1) proceeding, and section 43.6, paragraphs (a) through (d) specifically applies to a "petition" in a 13a(2) proceeding.[2]

Among other things, section 43.6 provides that petitions for authority to effect the discontinuance of a train shall contain information required by section 43.5 excepting paragraph (i) thereof. (49 CFR 43.6.) By requiring all other information contained in section 43.5 excepting paragraph (i), section 43.6 would appear to require the carrier to comply with the notice posting requirement of section 43.5(j).

Despite the language of section 43.6, such a requirement on the part of the carrier was never intended in a section 13a(2) proceeding. As originally issued by this Commission on August 14, 1958, paragraph (i) of section 43.5 contained the requirement with respect to the posting of notices in a section 13a(1) proceeding, and section 43.6, relating to petitions, required the

[2] Sections 43.7 and 43.8 apply to notices and petitions.

information set forth in section 43.5 excepting paragraph (i) thereof. (23 F.R. 6378, August 20, 1958). Thus, it is clear that, as originally issued, the applicable regulations did not require that the notice called for in a section 13a(1) proceeding be required in a section 13a(2) proceeding.

By subsequent amendments to the regulations on November 12, 1959, a new paragraph (i) was added to section 43.5 and the then existing paragraph (i) was amended and redesignated paragraph (j). (25 F.R. 434, January 20, 1960). No amendment or change in section 43.6 was made at that time and through inadvertence or as a result of an apparent mishap, the reference to paragraph (i) was retained in section 43.6 when it (paragraph (i)) should have been relettered paragraph (j). Thus, the only conclusion that can be drawn from the administrative history of the applicable regulations as well as from the contemporaneous construction placed thereon by this Commission is that the type of notice required in a section 13a(1) proceeding is not required in a section 13a(2) proceeding. In this connection, see *Pennsylvania R. R. Co.—Discontinuance of Passenger Service, Camden—Pemberton, N.J.*, F. D. No. 20553, decided June 6, 1960. To interpret the regulations differently would be inconsistent with the obvious intent expressed in sections 13a(1) and 13a(2) of the Act.

For the reasons stated, the 3 motions of protestants above-described to dismiss this proceeding should be overruled.

The trains sought to be discontinued, hereinafter identified as trains 13 and 16, operate daily between Greensboro and Goldsboro, a distance of 129.1 miles. As presently scheduled, eastbound train 16 leaves

Greensboro at 6:10 a.m., and arrives at Goldsboro at 10:45 a.m., serving 12 intermediate stations on regular stops and 9 stations on flag stops. Train 13 leaves Goldsboro at 3:05 p.m., and arrives at Greensboro at 7:50 p.m., serving 10 regular intermediate stations and 11 flag stops. These are the last two passenger trains operating in an east-west direction between Greensboro and Goldsboro. Appendix A hereto shows the schedules of the trains, the regular stops, flag stops and the populations of the cities and towns served by the trains.

The trains regularly consist of a 1,500-horsepower diesel electric locomotive, a passenger coach, and a combination car for passengers, baggage and express. In addition, on the portion of the run between Raleigh, N.C., and Greensboro, each train handles a sleeping car which, in turn, is handled on other passenger trains of petitioner between Greensboro and Washington, D.C., and on trains of the Pennsylvania Railroad between Washington and New York City, thus providing through sleeping car service between Raleigh, Washington, Philadelphia and New York City. The trains carry express but no mail. The trains are operated by a 5 man railroad crew consisting of an engineer, fireman, conductor, flagman, and brakeman. Although one crew makes a round trip, two crews are necessary in the operation because of limitations on the number of working days. In addition, a pullman conductor and a porter work the sleeping cars and an express messenger works the trains 5 days a week.

During the periods indicated below, the total number of passengers carried on trains 13 and 16, the daily average on each train and average passenger mile per train mile were as follows:

	Passengers		
	1959	1960	1961 (5 mos.)
Train 13	6,462	7,076	4,384
Train 16	7,789	7,700	4,550
Total	14,251	14,776	8,934
	Daily average		
	1959	1960	1961 (5 mos.)
Train 13	17.7	19.3	29.0
Train 16	21.3	21	30.1
Total	19.5	20.2	29.6
	Average passenger mile per train mile		
	1959	1960	1961 (5 mos.)
Train 13	6.51	7.16	10.67
Train 16	7.16	7.50	9.27
Total	6.83	7.33	9.97

Appendix "B" shows the on-and-off passenger count at each station for train 13 in 1960 and the daily average at each station. Appendix "C" shows similar data with respect to train 16 in 1960. In 1959 and in the first 5 months of 1961, the pattern of entrainment and detrainment was substantially the same as in 1960. As shown by these statistics, the overwhelming majority of the stations served averaged less than 1 passenger a day boarding train 13 or 16. Of the total passengers (7,076) carried by train 13 in 1960, 989 passengers entrained at Goldsboro, 826 at Raleigh, 2,929 at Durham and 1,464 at Burlington, and 5,048 passengers detrained at Greensboro. Of the total passengers (7,700) carried by train 16 in 1960, 5,101 entrained at Greensboro, 112 at Burlington, 775 at Durham and 667 at Raleigh. All but 1,279 of these passengers on train 16 detrained before reaching the

end of the line at Goldsboro, the heaviest detrainment (2,712) occurring at Durham, and at Burlington and Raleigh, with 1,275 each.

In 1948, both trains carried 56,739 passengers, an average of 77.51 per trip, as compared with a total of 14,776, or an average of 20.19 per trip, in 1960. During the same period, total passenger revenues declined from $60,534, or an average passenger revenue of $82.70 per trip, to $21,135 or $28.87 per trip. In 1959, 1960 and during the first 5 months of 1961, the average revenue per passenger was respectively, $1.39 $1.43, and $1.19. Each train earns from 21 to 22 cents per train mile in passengor revenue, and about 34 cents per train mile in express revenue.

As shown by petitioner's exhibits, the revenues derived from the operation of the trains in 1959, 1960, and the first 5 months of 1961, the direct expenses incurred in connection therewith and the expenses in excess of revenues were as follows:

	1959	1960	1961 (5 mos.)
Revenues:			
Passenger	$19,839	$21,135	$10,653
Express	31,873	31,630	4,697
Miscellaneous	356	336	140
Total revenues	52,070	53,101	15,490
Direct expenses	174,907	170,742	70,321
Expenses in excess of revenues	122,837	117,641	54,831

Appendix D shows the details of the operating results for both trains for 1960. Similar data is of record for 1959 and for the first 5 months of 1961.

Passenger revenues are actual as determined from the tickets collected by conductors, showing station to station travel, the class of passage and the type of ticket used. When interline travel is involved, revenues are determined on a mileage pro rate. Miscellaneous revenues represent actual revenues received

for the handling of newspapers, and express revenues are computed by the application of the system average revenue per carfoot mile to the carfoot miles assigned to trains 13 and 16. As to the computation of expenses, the wages of train and engine crews, vacation allowances, payroll taxes, and equipment rental are actual as shown by petitioner's books and records. Train fuel expenses were determined by applying the system average cost per gallon to the number of gallons of fuel consumed by these trains during a test period. Net losses from the operation of the sleeping car represents the excess of expenses over revenues between Raleigh and Greensboro, as billed to petitioner by the Pullman Company. Locomotive expenses are computed on the system average cost per diesel locomotive unit mile, and passenger car expenses are determined on a system average cost per passenger car mile. The joint facility expenses at the Goldsboro Union Station are computed on the basis of the number of cars moving in and out of the station.

Expenses resulting from damage to livestock and injuries to persons, incurred in 1960 and 1961, are actual. Neither of these expenses was incurred in 1959. Excluded from the carrier's operating costs are expenses for maintenance of tracks and structures, depreciation on equipment, traffic and supervisory expenses, property taxes, and general expenses. Other financial data presented by petitioner shows that system off-line revenues derived from the trains sought to be discontinued amounted to $73,960 in 1959 and $83,034 in 1960. After reducing these amounts by 50 percent as the cost of producing the revenue, the net feeder value of trains 13 and 15 was $36,980 and $41,517, respectively, in 1959 and 1960.

As a result of the discontinuance of these trains, petitioner claims that it will realize savings of

$122,837, which is equivalent to its out-of-pocket loss in 1959. In addition, it estimates that it will save another $15,015 annually, made up of station expenses ($4,046), rental for lease of property at Burlington ($6,280), and heat and light in various stations ($4,149).

With respect to other available methods of transportation, petitioner submitted data to show that 15 motor buses operate daily in each direction between Greensboro and Raleigh and 8 between Raleigh and Goldsboro, with 2 daily scheduled operations in through service between Greensboro and Goldsboro. In addition, local bus service is available twice a day in each direction between Raleigh and Durham. Most of the buses in the area provide through service to and from points beyond the terminals of trains 13 and 16, in addition to providing local service. Of the 23 stations served by trains 13 and 16, McLeansville, Glen and Rose are the only stations not directly served by motor bus.

Other rail passenger service is available at 4 stations now served by trains 13 and 16. At Greensboro, 7 trains of the petitioner in each direction provide daily service, and at Raleigh 6 daily trains of the Seaboard Airline Railroad are available in each direction. The Atlantic Coast Line Railroad operates 3 passenger trains daily in each direction through Selma, and 1 train a day through Goldsboro. These trains provide through service, including pullman, accommodations, to and from, among other points, Washington, D.C., New York City, Atlanta, Ga., Birmingham, Ala., and Richmond, Va. In addition, daily air line service is available between the Raleigh-Durham and Greensboro-High Point Airports and Washington, D.C., New York, Philadelphia, Chicago and other major cities.

At present most of the express traffic originating at and destined to Greensboro, Burlington, Durham, Raleigh, Selma and Goldsboro is handled by over-the-highway motor trucks of the Railway Express Agency, although it can still be transported via trains 13 and 16. At 8 of the smaller communities, which the Railway Express Agency is not presently authorized to serve by truck, express service is provided exclusively by trains 13 and 16. In the event the trains are discontinued, the Railway Express Agency proposes to handle all of the express by motor truck. In addition, other passenger trains previously mentioned herein provide express service at Greensboro, Raleigh, Selma and Goldsboro, and various bus lines in the area offer a limited express service.

For the most part, the 7 county-area through which the trains operate is traversed by a network of paved, all weather highways, at least one of which substantially parallels petitioner's railroad. Most of the communities served by the trains are located on improved highways or in close proximity thereto. In the area served by the trains, there is an average of one passenger automobile for every 2.9 persons as compared with an average for the entire State of one automobile for every 3.3 persons.

At the hearing before the North Carolina Public Utilities Commission, 18 public witnesses testified as to the need for the service provided by trains 13 and 16. In the instant proceeding, testimony was offered by 21 witnesses, most of whom use the trains with varying degrees of frequency. Many of the witnesses testified as to the use of the trains by members of their families, their employees and associates. Fifteen of the opposition witnesses, including college professors, research scientists, business executives and government employees, came from the Durham area or

had an interest there, and 3 were business men from Burlington. Their use of the trains is primarily for travel on the sleeping car between Durham or Burlington and Washington, D.C., Philadelphia, New York City and other intermediate points.[3] For personal convenience or because of medical necessity, these persons use the trains instead of other available modes of transportation. One witness expressed concern about express service to and from Elon College,[4] while others feared that the discontinuance of these trains would hamper the industrial development of the area. Through oral testimony, petitioner denied that the presence or absence of rail passenger service has any bearing on industrial development.

Other evidence or protestants relates to the uncleanliness of the passenger stations on the line, and the deterioration of service generally, including the lack of dining facilities on the trains, the failure of petitioner to pre-cool the cars in the summertime and to properly heat them in the wintertime, and difficulties encountered in securing reservations. At the hearing, protestants took the position that poor service and lack of modern facilities, plus petitioner's failure to advertise or solicit business, are primarily responsible for the reduction in passenger patronage. As against this, petitioner contends that its passenger facilities are clean, comfortable and modern, and that in the past efforts to attract additional patronage through advertising and solicitation have been unproductive.

[3] Durham and Burlington are 55 and 21.4 rail miles, respectively, from Greensboro, at which point the Pullman car on trains 13 and 16 is switched to and from other trains of petitioner.

[4] For some time in the past, express service at this station has been provided by truck.

Both at the hearing and on brief, protestants assail the method used by petitioner in computing many of its expenses on the basis of system averages. In the past this method of computing locomotive and passenger car expenses has been approved in train discontinuance proceedings as reasonably approximating the actual expenses incurred. *Louisville & N. R. Co., Discontinuance of Service,* 307 I.C.C. 173, and *Missouri Pac. R. Co., Discontinuance of Service,* 307 I.C.C. 787. As to the expenses at the Union Station in Goldsboro, these expenses are actual and will be savable to petitioner, since trains 13 and 16 are the last trains of petitioner using that terminal. Upon the discontinuance of the trains herein, the terminal expenses at Goldsboro would undoubtedly be redistributed among other carriers using the terminal. Since the terminal expense of the petitioner at Goldsboro amounts to about $7,000 annually,[4] it does not appear that the redistribution thereof will impose an undue burden upon other carriers in interstate commerce. In this connection, see *Wabash Railroad Company Discontinuance of Service Between Toledo, Ohio, and Fort Wayne, Ind.,* F. D. No. 20710, decided November 30, 1959.

It is doubtful that full recognition should be accorded to expenses for damage to livestock and injury to persons, since neither of these recur with sufficient regularity to treat them as part of petitioner's normal operating expenses. Inasmuch as both items of expense are insubstantial, the exclusion of them from petitioner's operating results will not alter the ultimate

[4] Terminal expenses at Goldsboro were $6,350 in 1959 and $8,940 in 1960.

findings made herein.[4] Except for these, the remaining expenses presented by petitioner are directly attributable to the operation of the trains and appear to be proper and fairly realistic.

In determining the net feeder value of these trains, the protestants contend that the reduction of the gross system-connected revenues by 50 percent, as representing the cost of producing such revenues, is purely speculative. Protestants, however, suggest no alternative cost formula. In rail abandonment proceedings as well as in train discontinuance cases, the Commission has accepted the 50 percent formula as reasonably reflecting the cost of producing system offline revenues. *Chicago, M. St. P. & P. R. Co., Discontinuance of Service*, 307 I.C.C. 565. In the absence of a more precise method for determining net feeder value, the examiner accepts as reasonable the 50 percent cost formula used by petitioner.

It is the further position of protestants that revenues are understated since no revenue was assigned to the trains for the transportation of pass riders. In a recent case, the Commission, in rejecting a similar contention, observed that "constructive revenues or phantom revenues—revenues from fares never collected—are of no measurable financial advantage to the carrier, and, thus should be disregarded in the computation of total revenues." *Southern Pacific Company Partial Discontinuance of Passenger Trains Between Los Angeles and Sacramento; Oakland and Sacramento; and San Francisco and San Jose, Calif.*, F.D. 20503, decided August 11, 1961. These remarks are equally applicable here. While no doubt the car-

[4] In 1960 expenses for injuries to persons were $500 and for damage to livestock $50. In 1961 expenses for injuries to persons was $3,500. Neither of these expenses was incurred in 1959.

rier incurs some expense in the transportation of pass riders, the expenses involved should be considered as being merely incidental to the petitioner's primary responsibility of operating the trains for the benefit of the public. So long as the trains are required to operate, the additional cost of carrying pass riders or deadheads is infinitesimal. Thus, there is no basis for reducing or adjusting the expenses of these trains because of the pass riders. Similarly, there is no merit in protestants' contention that the computation of express revenues on a car-foot mile basis is improper. See, *Chicago & N. W. Ry Co. Discontinuance of Service.* 307 I.C.C. 775.

Another contention of protestants' is that any operating deficit on this line should be reduced by a percentage amount equivalent to the combined federal and State corporate income taxes. In considering and rejecting a similar contention in *New York Central R. Co. Abandonment,* 254 I.C.C. 745, 755, the Commission stated:

> "The committee of Yonkers Commuters contends, in effect, that the actual loss of $60,155 from the operation of the branch should be reduced to $36,093 because if the loss had not been incurred, applicant would have paid a 40 percent Federal income tax on an equal sum, amounting to $24,062, but obviously the loss was actually incurred, and it cannot reasonably be considered that it was less because applicant's total inome [sic] tax might have been $24,062 less than it would have been had it not been incurred."

The findings and conclusions in the above report were affirmed in *Public Service Commission of New York* v. *United States,* 56 F. Supp. 351, affirmed 323 U.S. 675, rehearing denied 323 U.S. 817. The Commission has recently reaffirmed its position on this

issue. See *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc. supra.* The contention of protestants on this issue must accordingly be rejected.

At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,599, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the overall prosperity of the petitioner, as well as its intrastate freight operations, must be given effect in the disposition of the issues involved herein. With these contentions, the examiner disagrees. The legislative history of section 13a(2) indicates that the purpose thereof is to permit the discontinuance of the operation of services that *"no longer pay their way* and for which there is no longer any public need to justify the heavy financial losses involved." (S. Rep. 1647, 85th Cong.). [Emphasis supplied.] In considering a somewhat similar contention, in *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc. supra,* the Commission made the following pertinent statement:

> "Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

In this same connection, the argument that losing passenger operations must be supported by constantly increasing freight rates is also untenable. In re-

jecting this argument, the Commission stated that such "theory of regulation would not be consonant with the national transportation policy, and would be fraught with disastrous possibilities." *Great Northern Ry Co. Discontinuance of Service,* 307 I.C.C. 59, 61. Similarly, the fact that petitioner's system operations are profitable is entitled to little or no weight. See *New York Central R. Co. Abandonment, supra, Seaboard A. L. Ry. Co. Abandonment,* 257 I.C.C. 758, *Great Northern Ry. Co.—Discontinuance of Service, supra.*

Although protestants submitted no financial data with respect to trains 13 and 16, they contend on brief that the maximum loss incurred by the operation of these trains in 1960 was $33,688 instead of petitioner's claimed loss of $117,641. To reach this conclusion, protestants subtracted $6,940 (terminal expenses at the Goldsboro Union Station) and $41,517 (net feeder value) from petitioner's claimed loss. From this amount ($70,184),[7] they further subtracted a federal income tax deduction (52 percent of $70,184) of $36,496.

For reasons hereinbefore stated, terminal expenses at Goldsboro have been allowed, and protestants' contention regarding income tax savings has been overruled. In the foregoing computation, protestants assume that petitioner will lose all system-connected revenue produced by these trains. Petitioner claims that it will retain all of it. Neither of these positions can be reasonably sustained. It seems obvious that petitioner will neither loss nor retain all of such revenue. The exact amount of system-connected revenue losses, however, can not be determined from the record. But assuming that the entire net feeder

[7] There appears to be a mathematical error of $1,000 in protestants' calculation.

value of these trains will be lost, petitioner's minimum out-of-pocket loss from the operation of these trains, on the basis of 1960 figures and after deducting $550 for non-recurring expenses resulting from injuries to persons and livestock would be $75,574 annually. Add to this the savings of $15,015 in station expenses, previously referred to herein, and the net savings to be realized from the discontinuance of these trains would be at least $90,589 a year. On the theory that some of the feeder value will be retained, the examiner is of the opinion that the annual savings will be considerably in excess of $90,589 a year.

Among others, the factors to be considered in a proceeding of this nature are the populations of the communities served, the use made by the public of the trains sought to be discontinued, other means of transportation in the area, and the financial losses sustained by the carrier in providing the service. *Colorado* v. *United States*, 271 U.S. 153. Under the provisions of section 13a(2), the Commission's determination must be designed to protect interstate commerce from onerous burdens which may affect the ability of the carrier to continue to provide efficient transportation service to the public generally. Thus, in determining public convenience and necessity, the needs of the entire public, as distinguished from the relatively few, must be taken into account. When there is a demonstrated need for the service, the continuation thereof might be justified even at a loss to the carrier. In the final analysis, however, the need for the service must be balanced against the losses sustained in providing the service.

That some need exists for the service of trains 13 and 16 is shown by the testimony of the opposition witnesses. Their need, however, is relatively insubstantial when viewed in the light of the density of the

population of the area served and the patronage that is potentially available. Only scattered opposition appeared at the hearing in this proceeding and at the hearing held by the North Carolina Commission, and most of the opposition came from Durham, with virtually none east thereof. It is obvious that the needs of these few would be insufficient to justify the institution of a new service. Conversely, it should be equally apparent that under the test of public convenience and necessity, their needs no longer justify the continuation of existing service.

In arriving at this conclusion, the fact has not been overlooked that there has been an increase of nearly 50 percent in the daily average number of passengers patronizing these trains in the first 5 months of 1961 as compared with the entire year of 1959. In actual numbers, the daily average for both trains increased from 19.5 in 1959 to 29.6 in the first 5 months of 1961.

These figures, however, are of minor significance because the comparison of two entirely different periods fails to take into consideration seasonal variations in passenger traffic patterns and for the further reason that the increase in 1961 was due largely to an increased number of group movements of school children. Moreover, the percentage increase becomes even less meaningful when considered in the light of petitioner's statement that 82,000 additional passengers a year on these trains would be required to enable it to break even. Despite the increase in patronage in the first 5 months of 1961, passenger revenues during that period amounted to only $10,653, or $26,020 less than the wages of the train and engine crews.

For most of the major communities, alternate passenger service is available by bus and by air and 4 communities have rail passenger service. Only 3 small communities would be left wholly without bus

service. Likewise, express service by motor truck, as proposed by the Railway Express Agency, should be adequate for most of the communities. While industrial expansion may, under certain circumstances, depend on rail passenger service, it would appear that industry is much more concerned about rail freight service than rail passenger facilities. For this reason, and because of the ever-increasing use of automobiles in the area involved, the economic growth aspect of this case is relatively unimportant. Neither the isolated instances of poor service nor defective train equipment sustain protestants contention that petitioner has deliberately discouraged the use of these trains as part of its plan to present a plausible case for abandoning service on the line. Neither the present nor prospective traffic on the line would justify the use of expensive or ultramodern equipment on these trains. As to petitioner's failure to advertise the services of these trains, the Commission has repeatedly held that prospective patrons who must be coaxed to use a service evidently have no urgent need for it.

In the light of all these considerations, and for reasons hereinbefore stated, the conclusion is warranted that the continued operation of trains 13 and 16 would constitute a wasteful service and would impose an unjust and undue burden upon the interstate operation of petitioner and upon interstate commerce.

At the hearing, employees of petitioner whose jobs may be adversely affected as a consequence of the discontinuance herein requested that appropriate employee-protective conditions be imposed in the event the trains are discontinued. Although the 10 operating employees on the trains will be entitled to other jobs with equal or better pay, other employees with less seniority may be furloughed or temporarily

displaced. Three station employees and 2 pullman employees may also be furloughed. For reasons expressed in *Missouri Pacific Railroad Company Discontinuance of Passenger Service*, 312 I.C.C. 105, the examiner concludes that there is no authority under section 13a(2) for the imposition of conditions for the protection of employees adversely affected by the discontinuance of intrastate trains. It is recognized, however, that the probable adverse effect which the discontinuance of service would have upon employees is a factor to be considered in determining public convenience and necessity. In the instant proceeding such probable adverse effect does not afford a sufficient basis, when considered in connection with all of the facts hereinbefore discussed, to justify the continued operation of the trains.

Contentions of the parties as to either fact or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

In consideration of the petition here, the evidence adduced at the hearing, the contentions of the parties, and being fully advised in the premises, the examiner is of the opinion and finds that present and future public convenience and necessity permit the Southern Railway Company to discontinue the operation of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N.C., and that the continued operation thereof would constitute an unjust and undue burden upon petitioner's interstate operations and upon interstate commerce.

In view of the findings herein, the examiner recommends that the attached order granting the petition be entered.

By Wm. J. Gibbons, Hearing Examiner.

Wm. J. Gibbons.

[Signature] Wm. J. Gibbons.

APPENDIX A

SCHEDULES OF TRAINS NOS. 15 AND 16 OPERATING BETWEEN GREENSBORO AND GOLDSBORO AND POPULATIONS OF COMMUNITIES SERVED

Read down Daily 16	Miles		Pop.	Read up Daily 15
a.m.				p.m.
6:10	.0	Lv. Greensboro	119,574	Ar. 7:50
f 6:23	8.0	McLeansville	300*	f 7:25
6:30	14.7	Gibsonville	1,784	f 7:16
6:34	18.7	Elon College	1,284	f 7:10
6:50	21.4	Burlington	33,199	7:02
f 6:53	23.1	Graham	7,723	f 6:42
6:57	25.8	New Hope	1,415	f 6:38
7:10	31.7	Mebane	2,304	6:22
f 7:20	37.5	Efland	500*	f 6:21
7:26	40.9	Hillsboro	1,349	6:15
f 7:36	46.4	Glenn	n.s.*	f 6:06
7:55	55.6	Ar. Durham	78,302	Lv. 5:55
8:10	55.0	Lv. Durham		Ar. 5:55
f 8:22	66.7	Morrisville	222	f 5:19
8:39	73.8	Cary	2,356	6:14
8:55	81.1	Ar. Raleigh	93,931	Lv. 5:00
9:10	81.1	Lv. Raleigh		Ar. 4:30
f 9:18	86.9	Garner	2,451	4:20
9:30	96.1	Clayton	6,902	4:07
f 9:39	103.7	Wilsons Mills	280	f 3:57
9:50	109.2	Ar. Selma	3,102	Lv. 3:50
10:00	109.2	Lv. Selma		Ar. 3:50
f 10:08	111.9	Pine Level	628	f 3:30
10:15	117.7	Princeton	948	3:23
f 10:25	123.7	Ross	n.s.*	f 3:15
10:45	139.1	Ar. Goldsboro	28,873	Lv. 3:05

f—Flag stop.

n.s.—No population shown.

Source: Southern Railway System Passenger Train Schedules, folder dated October 26, 1980. Population figures taken from Final 1980 Census, U.S. Bureau of the Census except that those marked with an asterisk (*) were obtained from Rand McNally Commercial Atlas & Marketing Guide, 91st. Edition, 1980.

APPENDIX B

PASSENGERS HANDLED ON TRAIN 13

	On	D/A*	Off	D/A*
Goldsboro, N.C.	989	2.7	----	----
Rose, N.C.	1	----	2	----
Princeton, N.C.	75	.2	130	0.4
Pine Level, N.C.	18	----	18	----
Selma, N.C.	340	.9	201	.5
Wilsons Mills, N.C.	29	.1	23	.1
Clayton, N.C.	124	.3	17	----
Garner, N.C.	57	.2	5	----
Raleigh, N.C.	826	2.3	371	1.0
Cary, N.C.	25	.1	70	.2
Durham, N.C.	2,939	8.0	485	1.2
Glenn, N.C.	1	----	53	.1
Hillsboro, N.C.	51	.1	266	.7
Efland, N.C.	----	----	12	----
Mebane, N.C.	117	.3	38	.1
Haw River, N.C.	1	----	12	----
Graham, N.C.	4	----	3	----
Burlington, N.C.	1,464	4.0	156	.4
Elon College, N.C.	17	----	57	.2
Gibsonville, N.C.	8	----	140	.4
Greensboro, N.C.	----	----	5,048	13.8
Total	7,076	19.3	7,076	19.3

*Daily Average.

APPENDIX C

PASSENGERS HANDLED ON TRAIN 16

	On	D/A*	Off	D/A*
Greensboro, N.C.	5,101	13.9		
McLeansville, N.C.			2	
Gibsonville, N.C.	3		17	
Elon College, N.C.	19	.1	51	.1
Burlington, N.C.	112	.3	1,275	3.5
Graham, N.C.	4		4	
Haw River, N.C.	4		25	.1
Mebane, N.C.	68	.2	63	.2
Efland, N.C.	14		2	
Hillsboro, N.C.	127	.3	58	.2
Glenn, N.C.	14		4	
Durham, N.C.	775	2.1	2,712	7.4
Morrisville, N.C.			4	
Cary, N.C.	14		13	
Raleigh, N.C.	667	1.8	1,274	3.5
Garner, N.C.	49	.1	17	
Clayton, N.C.	174	.5	374	1.0
Wilsons Mills, N.C.	4		30	.1
Selma, N.C.	147	.4	343	.9
Pine Level, N.C.	26	.1	20	.1
Princeton, N.C.	378	1.0	133	.4
Goldsboro, N.C.			1,279	3.5
Total	7,700	21.0	7,700	21.0

*Daily Average.

APPENDIX D

Operating Results of Passenger Trains 13 and 16 between Greensboro, N.C., and Goldsboro, N.C. Year 1960

Revenues:	
Passenger	$21,135
Express	31,680
Miscellaneous	336
Total revenues	53,101
Direct expenses:	
Wages, train and engine crews	$89,182
Payroll tax	5,250
Train fuel	11,244
Injuries to persons	500
Damage to livestock on R/W	50
Pullman Co. net loss	4,226
Engine house expenses	1,590
Passenger locomotive lubricants	1,816
Passenger locomotive other supplies	372
Passenger locomotive repairs	21,586
Passenger train cars—CHLW & icing	7,164
Passenger train cars—lubricants	447
Passenger train cars—other exps	942
Passenger train cars—repairs	13,692
Passenger train cars—air cond	5,060
Goldsboro Union Station	6,940
Rental of equipment	681
Total direct expenses	170,742
Direct expenses of excess revenues	117,641

Recommended by Wm. J. Gibbons, Hearing Examiner.

[Signature] Wm. J. Gibbons

WM. J. GIBBONS.

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